in the notice however which in any way suggests that the spirit and the letter of the relevant articles in the Constitution are not being or will not be followed. The statement that if an inquiry is not claimed the Federal Government will proceed to make an order does not involve that they will proceed in any irregular manner or in defiance of any requirement of law or otherwise than in due and proper course.

The further contention that was advanced was that the matter set out under headings (a) and (b) of the notice, even if true, could not reasonably be said to amount to disloyalty or disaffection. Their Lordships cannot accept this. The complaint was that the appellant had "shown" himself by act and speech to be disloyal and disaffected. All therefore that their Lordships have to decide is whether such conduct as is denoted under the headings (a) and (b) was capable of demonstrating disloyalty or disaffection. If there were an inquiry much would depend upon the details and circumstances but their Lordships cannot hold that the allegations denoted by the wording under headings (a) and (b) were not capable of warranting the view that person had shown himself by act and speech to be disloyal and disaffected towards the Federation.

For the reasons which have been stated their Lordships cannot accept the submissions made on behalf of the appellant. Though he could have claimed an inquiry but did not do so and though he took legal action which has wholly failed and though his time for claiming an inquiry has long since gone by the respondent has stated that he will, if so requested in writing by the appellant within one calendar month after the conclusion of this appeal, himself refer the case to a Committee of Inquiry.

Their Lordships will therefore report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellant should pay the respondent his costs of this appeal.

Appeal dismissed.

Solicitors: *Graham Page & Co.*; *Wray, Smith & Co.*

OVERSEAS UNION BANK LTD. v. CHUA TENG HWEE trading as REXSON & CO.

[O.C.J. (Winslow J.) March 23, 1964]

[Singapore — Suit No. 41 of 1961]

Banking—Letter of credit—Compliance with terms—Rights of issuing bank.

Indemnity—Liability on letter of indemnity.

On June 10, 1960 the Bank of Tokyo Ltd., Osaka, opened an irrevocable commercial credit in favour of the defendant for account of Marugen Sangyo Co. Ltd., Osaka, up to an amount of £3,375 available by beneficiaries' drafts at sight on the bank's London office for full invoice cost accompanied by a number of stipulated documents which included: "Inspection certificate in duplicate issued by Moine Comte Co. Ltd., Singapore evidencing shipment of about 25 tons of 2240 lbs. of seaweeds (*tengusa*) at Stg. £135 per ton at 2240 lbs. nett C.I.F. Osaka from Singapore to Osaka...."

In due course the defendant presented the letter of credit to the plaintiffs for negotiation submitting the documents asked for in the letter of credit. There were some irregularites in the documents submitted the main one being that whereas the letter of credit required an inspection certificate evidencing shipment of about 25 tons of seaweed (*tengusa*), the certificate submitted was only a certificate of weight of the required quantity of seaweeds, with the qualifying word "*tengusa*" missing. The plaintiffs drew the attention of the defendant to these discrepancies but allowed themselves to be prevailed upon by the defendant to proceed with the negotiation. They took the precaution, however, of obtaining from the defendant a written indemnity against any loss to them arising from the discrepancies.

The letter of credit was duly negotiated and the sum due on it to the defendant was paid to him by the plaintiffs. However, when the discrepancies were later noted by the issuing bank the plaintiffs were asked to refund the amount on the letter of credit to the issuing bank and this the plaintiffs did. The plaintiffs then sought to recover the sum they had paid to the defendant basing their claim on the written indemnity that he had given them.

The main grounds of defence were that (1) there was no discrepancy between the documents required by the letter of credit and those submitted; (2) the plaintiffs were not compellable in law to refund to the issuing bank and should not have done so.

Held: (1) it is clear law that the terms of a letter of credit must be strictly complied with. Where documents are required to be submitted they must be in the exact form stipulated. There is no room for documents which are almost the same or which will do just as well. On the facts of this case there was no such strict accord or exact compliance with the terms of the letter of credit as to justify the plaintiffs in negotiating the draft which was presented;

(2) where the documents are not in compliance with the letter of credit the issuing bank is entitled to refuse payment, and having paid, to demand a refund. The plaintiffs were therefore compellable in law to make the refund; and having done this they were entitled to indemnification on the defendant's written indemnity for actual loss.

Cases referred to:—

(1) *Donald H. Scott & Co. Ltd.* v. *Barclays Bank Ltd.* [1923] 2 K.B. 1.

(2) *Equitable Trust Co. of New York* v. *Dawson Partners Ltd.* (1926) 27 Ll. L.R. 49.

(3) *Rayner & Co. Ltd.* v. *Hambros Bank Ltd.* [1942] 2 All E.R. 694.

(4) *English, Scottish and Australian Bank Ltd.* v. *Bank of South Africa* (1922) Ll. L.R. 21.

(5) *Bank Melli Iran* v. *Barclays Bank* [1951] 2 T.L.R. 1057.

(6) *Malas* v. *British Imex Industries Ltd.* [1958] 1 All E.R. 262.

ACTION.

J. Grimberg for the plaintiffs.

L. A. J. Smith for the defendant.

Cur. Adv. Vult.

Winslow J.: The plaintiffs' claim in this action — which could well be intituled "The Mysterious Affair of the Missing Word" — is for $29,621.45 on a written indemnity dated 30th June, 1960, given by the defendant to the plaintiffs as follows:—

"Re: Our Bill for Stg. £3,375.0.0d. Drawn on M/s. Marugen Sangyo Company Limited, Osaka against L/C No. L151238 issued by The Bank of Tokyo Limited, Shinsaibashi covering shipments of 25 long tons (500 bales) seaweeds (*tengusa*).

In consideration of your negotiation of our above-mentioned bills which, in terms of the relative letter of credit is/are drawn 'without recourse'. We undertake and hereby accept full responsibility and keep you indemnified in respect of any and all discrepancies that may exist between the documents as called for in the terms of the credit and the documents which we now present to you with the above bills.

Yours faithfully,
Signed T. H. Chua.
REXSON & COMPANY."

On the same day the plaintiffs paid to the defendant the sum of $28,768.03 being the proceeds of the letter of credit under reference in favour of the defendant.

Complaint is made that the documents presented by the defendant contained a discrepancy in that the letter of credit expressly or impliedly stipulated, *inter alia*, that the defendant should produce a certificate of inspection as to the weight, quality and fitness of a shipment of the seaweed referred to in the letter of credit whereas the certificate produced by the defendant referred only to weight.

Acting on the assurance of the defendant that the terms of the letter of credit had been complied with, the plaintiffs certified accordingly to the issuing bank which duly credited the plaintiffs' account with the sum of £3,375 in reliance on their representation. As a precautionary measure, the plaintiffs claim that, before payment, they took the letter of indemnity in question from the defendant in order to cover any loss to themselves should it subsequently transpire that the terms of the said letter of credit had not in fact been complied with and thereby result in the repudiation of the credit in question.

As events turned out, the discrepancy in question was discovered and payment was refused. The plaintiffs were called upon to repay the amount in question and duly did so. After protracted efforts to recover this amount from the defendant under the letter of indemnity had failed to produce any useful result, the plaintiffs brought this action. So much for the plaintiffs' claim.

The defendant denies owing the plaintiffs the amount claimed or at all. Whilst admitting receipt of the money in question, he denies that there were any discrepancies between the documents submitted by him and those called for in the letter of credit and, in particular, denies that the letter of credit expressly or impliedly stipulated that the defendant should produce a certificate of inspection as to the weight, quality and fitness of a shipment of the seaweed referred to in the letter of credit and contends that the certificate given by him was the certificate called for ir the letter of credit.

He further denies that the plaintiffs were in any way liable to make repayment to the issuing bank or that the issuing bank were justified in calling upon them to do so.

He further objects that the indemnity did not cover the issue of any certificate of compliance with the terms of the letter of credit issued by the plaintiffs and/or warranties made by them and/or any mistake of fact made by the issuing bank in crediting the plaintiffs' account.

He further contends that, even if there was any misrepresentation and/or warranty by the plaintiffs or if the issuing bank acted on a mistake of fact, the liability of the plaintiffs to the issuing bank was limited to a claim for damages for any loss sustained by the issuing bank and that, in turn, the issuing bank suffered no damage and the plaintiffs were therefore under no legal liability to make repayment.

He further contends that the goods were accepted by the consignee and that both the plaintiffs and the issuing bank were thereby discharged and the contract executed and that the only remedy available was a remedy by the consignee, who had taken possession of the goods, against the defendant for damages if the goods were not the goods ordered.

I have condensed above the main grounds on which the claim is based and the grounds on which such claim is denied.

Although the lines of defence may suggest that the case involves formidable and complicated issues of law and fact, my own view is that the issues are fairly straight-forward and may be reduced to two in number —

(1) Was there or was there not exact compliance with the terms of the letter of credit?

(2) If not, were the plaintiffs (who were the negotiating bank) legally compellable to make repayment to the issuing bank as in fact they did?

If there was no such compliance with the terms of the letter of credit and if the plaintiffs were legally compellable to make repayment, it would follow, as naturally as night follows day, that the defendant would be bound by his letter of indemnity to meet the plaintiffs' claim for the actual loss suffered by them.

Many cases were cited on the question of the degree of adherence to the terms of a letter of credit which a bank was entitled to demand when honouring a draft drawn in pursuance thereof. In chronological sequence they are as follows:—

1. In *Donald H. Scott & Co. Ltd.* v. *Barclays Bank Ltd.*[1] (a Court of Appeal decision) the following appears in the headnote —

"Bankers issued a letter of credit to English sellers of 100 tons of steel plates to Dutch buyers. By the terms of the letter of credit the bankers agreed to honour the sellers' draft for the amount of the purchase money (which included freight and insurance to Rotterdam) provided the draft were accompanied by an approved insurance policy covering the shipment of the goods. The sellers presented their draft accompanied by a certificate of insurance which did not contain and did not offer any means of ascertaining the full terms of the insurance. In an action by the sellers against the bankers for not honouring the draft:—

Held: that the certificate was not an 'approved insurance policy' within the meaning of the letter of credit, and that the bankers were justified in refusing to honour the draft."

Bankes L.J. in the same case, at page 11 said —

"....it may be stated generally that where a banker issues a letter of credit he is entitled to performance of all conditions precedent before he can be required to pay the amount specified, and if he stipulates as a condition precedent that he shall have a full set of clean bills of lading and an approved insurance policy, he is entitled to have those very documents, or at the least documents not materially differing from those documents, before he can be compelled to honour drafts upon him....

Applying the general principle then, first, was a full set of clean bills of lading, and secondly, was an approved insurance policy, tendered? The first condition was not complied with. Only two bills of lading instead of three were tendered. A tender of two bills of lading and an undertaking to produce the third, or of two bills of lading and an indemnity for not insisting on the third, is not a compliance with a condition requiring production of a full set. The learned judge treated this point as of no importance, perhaps because he thought the evidence established a waiver of the objection. I express no opinion whether that was the true inference from the evidence. It is admitted that a tender of two bills accompanied by either an undertaking to produce the third or an indemnity for accepting less than three is not a sufficient tender. If the learned judge was wrong in inferring a waiver, that is enough to dispose of this case. But I do not rest my decision on that ground alone, because the true effect of the evidence may be a matter of doubt.

On the next point, which is a very important one, two questions arise on the form of the document. First, does the document contain sufficient information to enable any one reading it to ascertain whether it reaches the standard of an 'approved insurance policy'? The other is whether the expression 'approved insurance policy," occurring in a letter of credit issued by an English bank to an English trading firm, means a policy of insurance in the English form valid according to English law and enforceable in England. It is not necessary to decide that question in this case. I rest my decision upon the fact that the document tendered was one of which no one could assert that it did or did not fall within the terms of the letter of credit."

2. In the 1927 House of Lords' case of *Equitable Trust Co. of New York* v. *Dawson Partners, Ltd.*[2] where one of the documents required was a certificate of quality issued by experts who were sworn brokers and a certificate issued by only one expert who was a sworn broker was submitted, Viscount Sumner said —

"It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. The documents tendered were not exactly the documents which the defendants had promised to take up, and *prima facie* they were right in refusing to take them."

3. In *Rayner & Co., Ltd.* v. *Hambros Bank, Ltd.*[3] the headnote reads as follows —

"A firm sold a consignment of groundnuts to Danish buyers. On instructions from the buyers a bank issued a letter of credit to the firm available on production of certain documents, including a bill of lading covering shipment of 'Coromandel groundnuts in bags.' The firm asked for payment and presented an invoice correctly describing the goods as Coromandel groundnuts and a bill of lading which described the goods as 'machine shelled groundnuts kernels' and clearly identified the goods with those described in the invoice. In view of the discrepancy in the description, the bank refused to honour the draft presented in pursuance of the letter of credit. It was contended that the two descriptions meant the the same thing and that by a custom of the oil seed trade 'Coromandel groundnuts' are understood to be machine shelled groundnut kernels.' The bank offered to pay if the firm would guarantee them against loss due to their accepting the documents but this the firm refused to do:—

Held: there is no obligation on a bank to know the customs of a particular trade and in view of the discrepancy of the description in the bill of lading presented by the firm and the letter of credit issued on their clients' instructions the bank was justified in refusing to pay."

In his judgment, MacKinnon L.J. in dealing with the legal result of a banker issuing a letter of credit of this type, quoted with approval the passage I have cited from Viscount Sumner's judgment in the earlier case of *Equitable Trust Company of New York* v. *Dawson Partners, Ltd.* and also approved another passage, from the judgment of Bailhache J. in *English, Scottish and Australian Bank, Ltd.* v. *Bank of South Africa,*[4] which seemed to him to sum up the position with the greatest accuracy, as follows —

"It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened."

With regard to the evidence of a custom of the oil seed trade equating "Coromandel groundnuts" with "machine shelled groundnut kernels", MacKinnon L.J. had the following observations to make:—

"That is stating the fact of evidence which was given by gentlemen who deal with groundnuts in Mincing Lane, and when Atkinson J. says that it is universally understood, he means that these gentlemen from Mincing Lane have told him that in Mincing Lane it is understood that Coromandel groundnuts are machine shelled groundnut kernels, that 'C.R.S.' means Coromandels. It is suggested that as a consequence the defendants, when this Bill of lading was brought to them for machine shelled groundnut kernels with 'C.R.S.' in the margin, ought to be affected with that special knowledge of these gentlemen who deal in these things on contracts in Mincing Lane. I think that is a perfectly impossible suggestion. To begin with, this does not concern any transaction in Mincing Lane. It is a transaction with Denmark, and for aught I know and for aught the evidence proved, the people in Denmark know nothing about this practice or usage of the people who have been in this business in Mincing Lane. Moreover, quite apart from that special application of the relevant considerations, it is quite impossible to suggest that the banker is to be affected with knowledge of the customs and customary terms of every one of the thousands of trades in regard to the dealings in which he may issue letters of credit. As I suggested as a homely illustration which is suggested by the books in front of me, if a banker was ordered to issue a letter of credit with respect to the shipment of so many copies of the 1942 Annual Practice and he was handed a bill of lading for so many copies of the 1942 White Book, it would be entirely beside the mark to call a lawyer, if that were necessary, to say that all lawyers know that the 1942 White Book means the 1942 Annual Practice. It would be quite impossible for business to be carried on and for bankers to be in any way protected in such matters, if it was said that they must be affected by a knowledge of all the particular details of the way in which particular traders carry on their business."

Goddard L.J. in the same case, said:—

"I protest against the view that a bank is to be deemed to have a knowledge of the trade of its various customers. But quite apart from that, even if the bank did know of this custom or trade practice, by which Coromandel groundnuts were described as 'machine shelled groundnut kernels' I do not think that would be conclusive of the case. There are three people concerned where a banker's credit is in question: there is the person who requests the bank to establish the credit, there is the bank, who establishes it, and there is the beneficiary who has the opportunity of drawing on the credit. The person who requests the bank to establish the credit can impose what terms he likes. If he says to the bank: 'I want a bill of lading in a particular form,' he is entitled to do so. If the bank accepts the mandate which he gives to them, they must accept it on the terms which their customer imposes. The bank can impose, as between themselves and the beneficiary, extra terms if they like. For instance, the bank does impose a term:

All drafts drawn hereunder must contain the clause: 'Drawn under confirmed credit No. 14597.'

The bank can say to the beneficiary: 'These are the terms upon which we will pay, and, if they have only been authorised by their customer to pay on certain terms, they must see that those terms are included in the notification which they give to the beneficiary, and they must not pay on any other terms. If they do pay on any other terms, they run the risk of their customer refusing to reimburse them. It does not matter whether the terms imposed by the person who requires them to open the credit are reasonable, or seem to be reasonable, or unreasonable. Of course, they may be terms which, as between themselves and the beneficiary, they would not be entitled to impose. The bank is not concerned with that. The bank, if it accepts the mandate to open the credit, must do exactly what its customer requires it to do, and if the customer says: 'I require a bill of lading for Coromandel groundnuts,' the bank is not justified, in my judgment, in paying against a bill of lading for anything except Coromandel groundnuts, and it is no answer to say: 'You know perfectly well machine shelled groundnut kernels are the same as Coromandel groundnuts'. For all the bank knows, its customer may have a particular reason for wanting 'Coromandel groundnuts' in the bill of lading. At any rate, that is the instruction which the customer has given to the bank, and if the bank wants to be reimbursed by the customer, it must show that it has performed its mandate."

4. In *Bank Melli Iran* v. *Barclays Bank* [5] the headnote reads:—

"A confirming bank must not disburse moneys under a letter of credit except against documents which comply strictly with the terms of the credit.

On the instruction of a Persian bank an English bank opened on January 9, 1947, an irrevocable confirmed credit. £40,000 was payable under the credit against delivery order for 100 new Chevrolet trucks 'accompanied by invoice, insurance policy and U.S.A. Government undertaking confirming that the trucks are new.' The trucks in question were in fact lying in the open exposed to severe winter conditions at Belcelle in Belgium.

The English bank on January 17, 1947, paid £40,000 under the credit against documents which included a delivery order for the trucks describing them as new-good'; and invoice stating them to be 'in new condition'; and a certificate from an official of the U.S. Government certifying that '100 new, good' trucks 'at Belcelle, near Antwerp, Belgium' had been purchased from them.

Held: that that payment by the English bank was not authorized by the credit, since (1) the phrase 'in new condition' in the invoice had a meaning essentially different from 'new' in relation to motor vehicles; (2) the certificate did not purport to relate to any specific trucks; and (3) the phrases 'new, good' in that certificate and 'new-good' in the delivery order were, like 'in new condition,' not equivalent to 'new.'

Where a letter of credit is opened the relationship between the instructing and the confirming bank is (unless otherwise agreed) that of principal and agent. Accordingly if, after the confirming bank has made an unauthorized payment, the instructing bank, knowing of that payment, act in a way inconsistent with repudiation of it, their conduct will amount to ratification of the payment."

This judgment is, accordingly, of interest, not only on the question of compliance with the terms of the credit, but also on the question of the relationship between an instructing bank and a confirming bank.

So much for the case-law relating to compliance with the terms of a letter of credit.

I now turn to a consideration of the answers to the two questions formulated by me earlier in this judgment but, before I do so, it might perhaps be profitable at this stage to deal with the facts of the case, as found by me, which are as follows:—

(a) On 10th June, 1960, the Bank of Tokyo Limited (hereinafter referred to as the "Bank"), Osaka, opened an irrevocable commercial credit No. L 151238 in favour of Rexson & Company, 38, Carpenter Street, Singapore 1 (the defendant) for account of Marugen Sangyo Company Limited, Osaka, up to an amount of Stg. £3,375.0.0d. available by beneficiaries' drafts at sight on the Bank's London office for full invoice cost accompanied by a number of stipulated documents, including the following:—

Inspection certificate in duplicate issued by Moine Comte Co. Ltd., Singapore evidencing shipment of about 25 tons of 2240 lbs. nett of seaweeds (*tengusa*) at Stg. £135.0.0d. per ton at 2240 lbs. nett C.I.F. Osaka (Packed in 112 lbs. nett per bale in new single hessian cloth) from Singapore to Osaka.

(b) On 30th June, 1960, the defendant, Mr. Chua, presented this letter of credit to the Overseas Union Bank Limited in Singapore, who are the plaintiffs in this action, for negotiation, submitting the documents asked for in the letter of credit. P.W.1, Mr. Tsan Wai Keaw, who was the plaintiffs' sub-accountant at their office in Raffles Place, handled the negotiation of these documents. He noticed some discrepancies which he drew to Mr. Chua's attention. Mr. Chua said that everything was all right and that the documents presented complied with the terms of the letter of credit. Mr. Tsan was not particularly satisfied but, after some remonstrances about irregularities, allowed himself, on the strength of the defendant's assurances, to be persuaded into negotiating the draft but he insisted that the defendant should give the plaintiffs a letter of indemnity against discrepancies which he agreed to do. The defendant accordingly signed the letter of indemnity referred to at the commencement of this judgment and received the sum of $28,763.03 by cashier's order. I should add that as to what transpired between Mr. Tsan and Mr. Chua on the date the letter of credit was negotiated I accept Mr. Tsan's version as against Mr. Chua's and I am satisfied that he took the letter of indemnity as a precaution against discrepancies and not solely because Mr. Chua was a stranger to the plaintiffs.

(c) Mr. Tsan then sent a draft for Stg. £3,375.0.0d. to the bank's London office together with the plaintiffs' certificate stating that the terms of credit had been complied with and that all the documents had been airmailed to the bank's Osaka office in two consecutive lots as required by the letter of credit.

(d) On 6th July, 1960, the plaintiffs received from the bank's London office a cable stating that the plaintiffs' account had been credited with the sum of Stg. £3,375.

(e) On 16th July, 1960, however the plaintiffs received a cable (page 16 of the Agreed Bundle of Correspondence — AB16) from the bank's Osaka office to the effect that payment had been refused on account of three irregularities. Only the first of these irregularities is of any consequence, so far as this action is concerned, and it was not suggested that the other two were of such merit in themselves as to warrant repudiation.

(f) On 19th July, 1960, the plaintiffs received a cable (AB19) from the bank's London office pointing out the same discrepancies. The latter office, of course, had not received the documents and had merely been informed of the discrepancies in question by their Osaka office. The London office accordingly asked for the plaintiffs' authority to debit their account in the sum of Stg. £3,375.0.0d. plus interest. The plaintiffs authorised this reversal of the credit. It is noteworthy therefore that, at least between the 6th July, 1960 and 18th July, 1960, the London office had been out of pocket to the extent of this sum as a result of this transaction.

(g) Immediately on receiving the cable (AB16) informing the plaintiffs that payment had been refused Mr. Tsan contacted Mr. Chua by telephone and pointed out that his own previous complaints of irregularities in the documents submitted by Mr. Chua on 30th June, 1960, had been proved correct by the repudiation of the credit by the bank's Osaka office. Mr. Chua refused to make any comments because, as he said, the documents were not in front of him and he told Mr. Tsan to write to him officially about it. Later, when Mr. Chua heard that the plaintiffs had made a refund to the bank's London office, he was furious at not having been consulted in the matter before any decision to refund was made.

(h) On 19th July, 1960, the plaintiffs wrote to the defendant informing him that they had made the said refund and that if the defendant could not settle the matter with the buyers in Japan, the plaintiffs would be obliged to call upon the defendant for a refund of the sum in question. The defendant admitted that, after receiving this letter, he sat on it and did nothing further about it. It is significant that, from then onwards, the defendant refused to be drawn into any further correspondence relating to the requirements of the letter of credit in question and merely satisfied himself with writing a letter to the buyers asking them to settle their bill with the issuing bank in Osaka and to provide documentary proof that the seaweeds shipment was unsatisfactory (AB27).

(i) On 26th September, 1960, he wrote to the plaintiffs rebuking them for making the refund and asked for a copy of the alleged letter of indemnity.

(j) I am inclined to agree with Mr. Grimberg's submission that the few letters written by the defendant after the "storm" broke are not letters which a man who was positive that he had shipped the right goods would write. He was literally "peppered" with letters by all concerned but he sat tight, confident in the belief that he had shipped the right goods and had sent the right documents. He was not prepared to consider that there could possibly be more views than one with regard to a situation like this nor was he particularly perturbed by the fact that he had given a letter of indemnity to the plaintiffs accepting full responsibility for any discrepancies. He had got his money and he had shipped goods in purported compliance with his contract with the buyers and he was determined to see that the plaintiffs should not succeed in enforcing their indemnity unless they could prove that the right goods had not been shipped. He treated the latter with scant regard, if not immense disdain. There was a certain smugness, self-assurance and self-righteousness about the manner in which he gave evidence which was undeceptive and I formed the impression that he was and had, all along, been prepared to brazen things out somehow, if necessary to the extent of shifting the blame, for anything which might go wrong, to the buyers or, failing the buyers, to his own suppliers, without any consideration for the solemn undertaking which he had given to the plaintiffs. Nor did he make any effort to call evidence or produce any documents showing what goods he had bought from his suppliers or how much he had paid for them. This would certainly have helped to enhance his *bona fides*.

(k) Having sent a cable dated 20th July to the buyers stating that he was investigating (AB23) he did nothing further about investigating. Apart from writing AB27 to the buyers asking for documentary proof of unsatisfactory shipment he completely ignored all further letters from the buyers. In order to appreciate the way in which his mind works it will, perhaps, be useful for me now to turn to an examination of the circumstances relating to the discrepancy under complaint as this was the first transaction in seaweeds with a foreign firm that he had ever had in his life.

(l) I have referred earlier to the one irregularity or discrepancy which was stressed in this case, namely,

that whereas the letter of credit required an inspection certificate issued by Moine Comte & Co. Ltd., Singapore, evidencing shipment of about 25 tons of seaweeds (*tengusa*), the certificate which was, in fact, submitted was only a certificate of weight of the required quantity of seaweeds. This certificate was qualified by a sentence at the end reading as follows:—

"This report refers to weight only and does not certify to the proper description of the goods nor of the contents of the packages."

It was therefore argued that the omission of the word "*tengusa*" in brackets after the English word "seaweeds" and the reservation in the last sentence that this report was a weight report only and not a certificate of the proper description of the goods or of the contents of the packages made this certificate one which did not strictly comply with the requirements of the letter of credit for an inspection certificate evidencing shipment of seaweeds (*tengusa*).

(m) Two other certificates issued by Moine Comte & Co., Ltd. relating to "dried prawns (*crevettes sechees*)" were put in as exhibits P2A and P2B, one of which P2A, was clearly stated to be an inspection certificate certifying that the goods in question were dried prawns (*crevettes sechees*) whilst Exhibit P2B was couched in language similar to the certificate in the present case in that it purported to be a certificate of weight under the general printed heading "Certificate of Inspection" with the same reservation in the last sentence that it referred to weight only and did not certify the proper description of the goods or of the contents of the packages. The only point of any difference between P2B and the weight certificate in the present case seems to lie in the fact that in certifying the weight of the dried prawns in question the certificate uses the words "We did supervise the weighing of one lot of 5 cases said to contain dried prawns (*crevettes sechees*)". (The underlining is mine). In the present case the words used are "We did supervise the weighing of one lot of 500 bags of Seaweeds". I do not think however that the words "said to contain" in Exhibit P2B are of any great significance having regard to the fact that the last sentence in each certificate makes it quite clear that the certificates relate only to weight and not to description. It is true that P.W.2, Mr. Stephen Wee from Moine Comte & Co., Ltd., said that, if the bags had contained nuts and bolts he would not have described them as seaweeds in the weight certificate but it is quite obvious from the last sentence, and his evidence, that no responsibility was accepted as to the contents of the packages. The mere fact that Moine Comte & Co., Ltd. have issued and do issue certificates of inspection as such, without qualification, separately from certificates of weight, *albeit* under a printed heading which they always use, indicating inspection, shows that there is some kind of trading practice which lends credence to the submission that there is a definite distinction between the two. I do not think that the mere fact that the words "Certificate of Weight" appear as a separate sub-heading under the general printed heading "Certificate of Inspection" (as used on all their printed forms) converts a certificate of weight into a legitimate certificate of inspection for all purposes. It is in short a certificate of inspection of weight and little else apart from what it says. It is not a certificate of inspection of the goods themselves.

(n) It was further argued for the defendant that the omission of the word "*tengusa*" in brackets after "seaweeds" in the certificate was of no consequence as "*tengusa*" was the Japanese word for "*agar agar*", which is a word of Malay origin recognised in the English language by its inclusion in the Shorter Oxford Dictionary and defined as "an East Indian seaweed from which a gelatinous substance is extracted for use in soup and for a culture medium". It was therefore argued that it logically followed that —

"*tengusa*" = "*agar agar*" = "*seaweed*".

But it is important to note, however, that the word for "seaweed" in Japanese in the same authoritative dictionary, submitted by counsel for the defendant, is "*kaiso*". Counsel's argument was that where a foreign word is included in brackets after an English word it must necessarily have the same meaning as the preceding English word. If this is correct, the letter of credit should have called for "seaweeds" (*kaiso*). But it did not. One has only to consider the different types of orchids and oysters, which connoisseurs affect, to appreciate that not all of them when referred to by their Latin or other foreign names mean exactly the same thing. If I order orchids (*vanda*) I do not expect to get a different kind of orchid. Nor if I refer to oysters (*ostrea edulis*) — which is the common European species — do I refer to Californian oysters from the Pacific coast. In addition, I have the benefit of the evidence of P.W.3, Mr. Khoo Boo Teong, which I accept, to the effect that "*tengusa*" is a particular type of edible seaweed for making agar agar. I therefore find as a fact that, although in P2A certain French words have been included in brackets which have the same meaning as the English words preceding them, the word "*tengusa*" in brackets does not necessarily have the same meaning as the preceding English word "seaweeds" but, in fact, means a particular type of East Indian seaweed. All "*tengusa*" may be seaweeds but not all seaweeds are "*tengusa*".

(o) I am reinforced in this conclusion by the fact that the provisional sales contract (AB1) between the buyers and the defendant clearly describes the commodity required as "*agar agar* raw materials (*tengusa*)" and provides for the quality thereof to be "as per (the defendant's) sample marked — Rexson No. 2443". There could therefore have been little doubt in the defendant's mind as to what the buyers wanted. He, however, according to his evidence, made a careful study of the letter of credit and decided that seaweeds were all that were wanted, notwithstanding the addition in brackets of the word "*tengusa*" and notwithstanding the request by the buyers in AB1A for a survey report although this was not mentioned in the letter of credit. He shipped seaweeds without ensuring that they were described in the required certificate as "seaweeds (*tengusa*)". He, furthermore, told Moine Comte's representative (Mr. Wee) that no quality sample was required (AB8) and asked merely for a certificate of weight and packing. I accept Mr. Wee's evidence that he was even told by the defendant that this was an entirely different shipment from that referred to in the instructions from the buyers (AB5) and that is why he, Mr. Wee, was led into merely certifying weight and packing, and not the proper description of the goods or the contents of the packages.

Having made the above findings on the facts, it remains for me to deal with such further questions of law, as were raised in their submissions, by both counsel in the case.

Mr. L. A. J. Smith (for the defendant) submitted that there was no breach of contract between the buyers and the defendant, that the former were "crooks" and that they were generally lying all round. He further submitted that there was not a shred of evidence that the right goods had not reached the buyers, who had accepted the same, and that there was no legal obligation on the part of the plaintiffs to pay the issuing bank or at all.

With great deference to Mr. Smith's undoubtedly wide practical and legal experience of matters like these, I am unable to accept his contentions or to hold that there was either exact compliance with the terms of the letter of credit or that there was no legal obligation on the part of the plaintiffs to make repayment.

Further, I do not think that in a case like this, which is based on the defendant's liability on his own indemnity against discrepancies as between the documents submitted in purported compliance with the letter of credit and those actually required thereunder, any question arises as to whether the goods actually shipped were nuts and bolts or seaweeds (*tengusa*). If the goods actually shipped and received were seaweeds (*tengusa*), the buyers, on their contract with the seller, would not have had cause for complaint.

So far as the status of bankers who negotiate letters of credit is concerned, however, their position is different. They are not concerned, as such, with the contract between the seller and the buyers and this, I think, is where the fallacy in Mr. Smith's approach to the whole case lies. If the banker does not receive documents exactly complying with the terms of the credit he is entitled to refuse payment.

If he refuses payment for non-compliance the seller should look for redress to the buyers if he insists that he has shipped the right goods. If the banker finds that the documents comply exactly with the terms of the letter of credit he will pay, even if it should subsequently turn out that the wrong goods have been shipped. In such a contingency it would be up to the buyers to pursue their remedies under their contract with the seller and the banker is not concerned in the matter at all. He is merely the conduit pipe through which the money flows under the letter of credit. The business of banking could not be securely transacted if bankers were to find themselves embroiled in disputes between the buyers and the seller in regard to the question whether the goods are up to contract or not where there has been exact compliance between the documents submitted and those called for in the letter of credit. If any authority is required for this proposition it will be found in *Malas* v. *British Imex Industries, Ltd.*,[6] which was, however, not drawn to my attention during argument, where Jenkins L.J. said —

"We were referred to several authorities, and it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice. It has also to be remembered that a vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often re-selling goods bought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice — and I think it was followed by the defendants in this case — is to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute between the vendor and the purchaser were to have the effect of 'freezing', if I may use the expression, the sum in respect of which the letter of credit was opened."

I should mention that, in the case just cited, no question was raised as to any lack of compliance with the terms of the letter of credit in question.

It seems to me, from the authorities cited earlier, that the conclusion is inescapable that on the facts of the case before me, there was no such strict accord or exact compliance with the terms of the credit concerned as to justify the plaintiffs in negotiating the draft which was presented in pursuance thereof. If the buyers stipulated in the letter of credit for "seaweeds (*tengusa*)" they were entitled to expect all the documents to mention "seaweeds (*tengusa*)". If the buyers insisted on an inspection certificate evidencing shipment of the required quantity of "seaweeds (*tengusa*)" they were entitled to have an inspection certificate certifying that the goods in question were "seaweeds (*tengusa*)". It was not sufficient for the defendant to supply a mere certificate of weight of seaweeds (*sic*). Further, in my opinion, it is quite irrelevant to consider what the word "*tengusa*" means. If the buyers asked for seaweeds (*tengusa*) they were entitled, like the purchasers of coromandel groundnuts in *Rayner's* case, to get the stipulated documents certifying that the goods were in fact seaweeds (*tengusa*), whatever "*tengusa*" may mean.

Japanese buyers cannot be expected to concern themselves with what the practice or usage of the people of Singapore in this line of business is. When they asked for seaweeds (*tengusa*) they expected to get seaweeds (*tengusa*) according to their own understanding of that expression. As Goddard L.J. in *Rayner's* case, *supra*, said at page 703

"The bank, if it accepts the mandate to open the credit, must do exactly what its customer requires it to do, and if the customer says: 'I require a bill of lading for coromandel groundnuts,' the bank is not justified, in my judgment, in paying against a bill of lading for anything except coromandel groundnuts, and it is no answer to say: 'You know perfectly well machine shelled groundnut kernels are the same as coromandel groundnuts'. For all the bank knows, its customer may have a particular reason for wanting 'coromandel groundnuts' in the bill of lading."

In the same way, the Japanese buyers in this case, may have had a particular reason for

wanting "seaweeds (*tengusa*)" in the inspection certificate.

It is quite clear that the plaintiffs were not prepared to take the risk of negotiating the letter of credit without a letter of indemnity. They would have been perfectly justified in refusing to negotiate the draft which was in fact presented, for the reasons I have stated. However they asked for an indemnity and got it, whereas in *Rayner's* case, the bank asked for a guarantee against loss but Rayner & Co., Ltd. refused to give them one.

As MacKinnon L.J. in *Rayner's* case said, in the concluding part of his judgment, if the risk was negligible Rayner & Co., Ltd. would have readily given the required guarantee. Hambros Bank could not be called upon to take the risk and Rayner & Co., Ltd. could not insist that Hambros Bank should take the risk. In the present case, the defendant indemnified the plaintiffs against their taking that risk. I do not think that I need concern myself with deciding whether he gave that indemnity because he thought the risk was negligible or whether he gave that indemnity because he was anxious to lay his hands on a large amount of cash in what was his first transaction with a foreign firm in connection with seaweeds. If it is considered that any decision is necessary, I would hold that he knew perfectly well that the risk was not, in the least, negligible. He could only have been anxious to lay his hands on ready cash. In accordance with my findings of fact, earlier in this judgment as to the defendant's conduct in relation to this transaction, I am satisfied that he knew exactly what he was doing. There seems to be no justification for his cavalier treatment of P.W.1, Mr. Tsan Wai Keaw, of the Overseas Union Bank. Having given this indemnity to the plaintiffs, he was bound to reimburse them for their actual loss.

A considerable amount of argument was directed towards the question whether the plaintiffs were legally compellable to repay the issuing bank. Having regard to my findings as to the inadequacy of the documents presented, it follows that they were in fact so compellable. As agents of the issuing bank they were bound to make repayment because they had innocently misrepresented to the latter that the documents were in order. Acting on this assurance, the issuing bank credited the plaintiffs with the required amount which they would not have done had they been aware of the true facts. As soon as they received the documents they repudiated the credit. There was therefore no question of waiver or ratification on the part of the issuing bank. As I have said before, neither the issuing bank nor the confirming bank is concerned with disputes between the seller and the buyers.

In case any doubt exists as to the correctness of my conclusion as to the right of the plaintiffs to be indemnified against the actual loss incurred by them I would refer to the following passages from *Halsbury's* Laws of England 3rd Edition, Volume 18 at page 536 et. seq. —

"At law an action on the contract of indemnity normally does not lie until the promisee has been actually damnified by paying the third party's claim. When however, he has so paid it, the amount paid constitutes a debt due to him from the promisor which he may recover in an action, with interest, apart from certain exceptional cases in which circumstances exist preventing the exercise of his full rights. The right to indemnity, however, may arise under a special contract, on the true construction of which the right may be enforced, even at law, before actual loss has been sustained. In general, time runs against the right of the person indemnified to bring an action upon the contract of indemnity from the date when he is actually damnified by being called upon to pay and not from the date when the event occurs which gives rise to his liability to pay.

In equity, the rules of which now prevail in all courts, even in the absence of a special agreement, the person entitled to the indemnity may, obtain relief as soon as his liability to the third party has arisen, and before he has actually suffered loss. He may, therefore, in an appropriate case obtain an order compelling the promisor to set aside a fund out of which the liability may be met, or to pay the amount due directly to the third party, or even, when the promisor is under no liability to the third party, as is the case in contracts of mere indemnity, to the promisee himself. The party indemnified is not precluded from obtaining relief by the fact that his liability to the third party cannot be effectively enforced against him."

It would appear from the above that the law is strongly in favour of the plaintiffs and in fact, as Mr. Grimberg submitted, goes further than what they ask for. The plaintiffs are, in my view, entitled to damages in the amount of their actual loss, with interest. Judgment will therefore be entered for them as claimed with costs.

Claim allowed.

Solicitors: *Drew & Napier*; *L. A. J. Smith.*

LEE HWA LIANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) April 1, 1964]

[K.L. — Criminal Appeal No. 11 of 1964]

Gaming—Sale of "tikam" board by shop-keeper—Whether "assisting" in carrying on a public lottery—Common Gaming Houses Ordinance, 1953, ss. 4(1)(c) and 8(1).

Public Lottery—Sale of "tikam" board by shop-keeper—Whether promoting a public lottery.

The appellant, a shop-keeper, displayed about 200 "tikam" boards in his shop for sale. He sold one of these to a police inspector and on the same day his shop was searched by a police party under a search warrant and he was arrested and his stock of "tikam" boards taken possession of by the police.

He was subsequently charged and convicted for assisting in carrying on a public lottery under section 4(1)(c) of the Common Gaming Houses Ordinance and the "tikam" boards confiscated. On appeal,